
IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John P. Carter, former Collector of Internal Revenue for the Sixth District of California,

Plaintiff in Error.

vs.

Jacob Bauman,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

DAN J. CHAPIN,

Attorney for Defendant in Error.

No. 5098.

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STATEMENT OF THE CASE.

Jacob Bauman, the defendant in error, is a resident of the city and county of Los Angeles, California, and was on the 15th day of November, 1920, the proprietor of Bonded Winery No. Five, Lankershim, that the defendant in error had given to the United States a bond covering the premises occupied by said winery, conditioned that he would comply with all the laws and regulations respecting the production and fortification of all wines produced and account for all brandy used in fortification of wines

manufactured on the winery premises, that said winery premises, thus bonded, included within the boundaries thereof, a room known and designated as a fortifying room, that on the afternoon of the 15th day of November, 1920, Jacob Bauman deposited 890.9 proof gallons of grape brandy in the fortifying room under the supervision of an officer of internal revenue, designated by the plaintiff in error; that the officer secured the only door leading into the fortifying room by a government lock, keeping the key thereto in his possession, that sometime during the early hours of the evening of November 15, 1920, the door, aforesaid, was forced open by some one unknown to either the plaintiff or defendant in error and the entire 890.9 gallons of brandy, so deposited, therein was stolen therefrom. After the brandy was so stolen, Jacob Bauman paid under protest a stamp tax of \$1805.98 on the 820.9 proof gallons of brandy stolen at the rate of \$2.20 per proof gallon. Accordingly the present action was instituted against plaintiff in error, former Collector of Internal Revenue, to recover the tax thus paid under protest. Judgment passed in the District Court in favor of defendant in error for the return of the amount sought to be recovered in accordance with the complaint, and the present appeal results therefrom.

Prior to November 23, 1921, there was no provision of law that relieved the proprietors of distillery warehouse or other bonded warehouse from the tax on distilled spirits stored therein, lost by theft. Congress on the date aforesaid, passed an act entitled "An Act supplemental to the National Prohibition Act," known as the Willis-Campbell Act (42 Stat. 222) which relieved the proprietors from the tax on distilled spirits so lost from aforesaid ware-

houses provided, the loss was not caused by the negligence, connivance, collusion or fraud on part of the owner or proprietors thereof. Section five (5) of said act in part is as follows:

“If distilled spirits upon which the internal revenue tax has not been paid are * * * lost by theft from a distillery or other bonded warehouse and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence, connivance, collusion or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claims for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.”

The sole question involved here is whether a room on the premises of a bonded winery, known as the fortifying room, is a “distillery or other bonded warehouse” within the meaning of section 5 of the Willis-Campbell Act (*supra.*) The determination thereof hinges on whether or not a fortifying room on the premises of a bonded winery premises is a bonded warehouse, as defined by the statutes providing for such warehouses.

It is the contention of the defendant in error:

(1) That a fortifying room on the bonded premises of a winery is a bonded warehouse.

(2) That there has been no decision of the Federal Courts passing upon the precise question involved in the appeal. Such being the case, the question is resolved into a comparison of the laws and regulations constituting distillery warehouses and such other bonded warehouses as the statutes have provided for and fortifying rooms on bonded winery premises and if the requirements, authority and control are the same as to all, then it must follow that a fortifying room is a bonded warehouse.

(3) That distilled spirits stored in a fortifying room, loss by theft is not subject to any tax thereon.

(4) That where the government exercises a control and dominion over a warehouse that is superior to the owner, it cannot be a free warehouse and if it is bonded, then it must be a bonded warehouse.

Statutes Involved, Primarily.

Section 5 of an Act Supplemental to National Prohibition Act (42 Statute 222) *supra*.

Secondarily (For Comparison).

Regulations Series Number 7, pages 30, 31 and 34;
Section 51, Revised Statutes, Act of August 27,
1874 (28 Stat. 509);

Section 1, Revised Statutes, Act of March 3, 1877
(19 Stat. 393);

Section 45, Revised Statutes (26 Stat. 621);

Regulations Number 28, part 1, Revised 1918, page
13, paragraphs 4 and 5;

Sections 3271, 3273 and 3274, Revised Statutes.

The pertinent provisions of the above sections are set out further along in this brief.

Facts.

The facts have been stipulated, record of transcript pages 11 to 14 inclusive, so no issue of fact is involved before this court.

ARGUMENT.

I.

A Fortifying Room on the Premises of a Bonded Winery Is a Bonded Warehouse.

In order to sustain the position above stated, two elementary propositions must be settled.

(1) That the room in question is a warehouse.

(2) That the premises of which it is a part, is bonded.

A warehouse is defined by Webster's Unabridged Dictionary as follows: generally, "A storehouse for wares and goods, a receiving house," specifically, "To deposit or secure in a government or bonded warehouse until duties are paid."

A warehouse was considered in 23 Maine 47, the court saying:

"A warehouse is a place used for the reception of goods and merchandise."

The government regulation prescribing the requirements of a fortifying room make of it a warehouse as defined above (Regulations No. 28, Part I, pages 13 and 14 *supra*.)

Paragraph Five.

(a) "This room will be locked with government seal lock, the key of which at all times, when brandy, sweetening agents or wines for refortification are on deposit therein.

(b) "The fortifying room must be sufficiently large to admit storage of all brandy withdrawn for fortification purposes that may be on hand unused at any one time. * * * All tanks within the fortifying room must be designated as fortifying tanks.

(c) "* * * The office must be furnished with chair, a desk, with one or more drawers * * * and of a capacity enough for keeping blanks, forms, rough drafts of form 275 daily reports of fortification * * *"

That the fortifying room in question was used for the purpose of storing goods and merchandise and further that on the goods and merchandise stored therein the duties had not been paid, the transcript, page 12, paragraph 4, 5 and 6 discloses that 890.9 gallons of grape brandy was stored and deposited therein. It is, therefore, submitted that a fortifying room is a warehouse.

It is admitted by paragraphs 3 and 4, page 12 of the transcript, that the fortifying room in question was bonded, therefore, it is contended the determination of propositions one to four above is that the fortifying room on the premises of a bonded winery is a bonded warehouse.

This contention is further sustained by court decisions as follows:

In the George case, 41 Fed. 257, the court says:

"That a bonded warehouse is one which the Government holds and maintains control of the security of its contents superior to that of the owner to such extent that he can only have admittance thereto at the sufferance of the Government officer, that such a bonded warehouse can in no sense be construed as a free warehouse."

Justice Hughes passing on the control of warehouses held:

“The control of the Government’s representatives is made dominant as in the nature of the case it must be in order to fulfill the purpose of the act.”

232 U. S. Reports 174.

These expressions of the court show that the Government’s control over bonded warehouses and that where such is the case that the warehouse is bonded, otherwise, it would be a free warehouse.

A fortifying room on the premises of a bonded winery in view of these decisions must be classed as a bonded warehouse as its contents are absolutely under the control of the Government’s representatives to the exclusion of the proprietor. It being such a warehouse, there can be no tax asserted on spirits or brandy lost therefrom by theft.

Are the Requirements Relative to Construction, Control and Dominion Over a Fortifying Room Comparatively the Same as the Statutes and Regulations Prescribed for a Distillery or Other Bonded Warehouse, as Other Bonded Warehouses Have Been Specifically Designated by the Statutes and Regulations.

In making the comparison, the provisions relative to distillery warehouses have been used, as no provisions of law are made regarding construction of general and special bonded warehouses.

Sections 3271 and 3274, Section 617, Act of February 24, 1919, 40 Stat. Revised Statutes, provided

as to distillery warehouse as follows :

Distiller must provide a warehouse at his own expense. Must be part of distillery premises, can be used only for storage of spirits of his own manufacture until tax thereon has been paid.

No door, window or other opening shall be made or permitted in the wall of such warehouse leading into the distillery or any other room or building.

Plan of distillery warehouse must be approved by the Commissioner of Internal Revenue.

Distillery warehouse shall be under the direction and control of the collector of the district and in charge of an internal revenue store-keeper gauger, assigned thereto by the commissioner.

1057), and regulations promulgated thereunder, provide as to fortifying rooms (Reg. 28, Part 1, paragraph 4 and 5) *supra*, as follows :

Wine maker must provide fortifying room, must be part of the bonded winery premises, can be used for storage of brandy either his own make or secured from another distillery and allowed to remain until tax is paid on wine after fortification.

The room must be securely built and partitioned as to be entirely separate from every other part of the winery. With all the doors, windows or other openings leading to or from the room so arranged and built that the same may be securely locked, bolted or barred from the inside.

Plan of fortifying room must be approved by the Commissioner of Internal Revenue.

The fortifying room when brandy is stored therein shall at all times be under the supervision and in the custody of an officer of internal revenue.

Every distillery warehouse shall be in joint custody of the government officer and the proprietor and be kept securely locked and the key in possession of the government officer and can be opened only in presence of the officer, and no articles can be received or delivered therefrom except on order or permit addressed to the storekeeper and signed by collector having control of the warehouse.

Every distillery must give a bond covering the tax on the spirits to be deposited in the distillery warehouse, conditioned that any tax against said spirits may be recovered from the bond.

It will be noted that the requirements as to construction and control are essentially the same relative to distillery warehouse and a fortifying room. The statutory and regulatory requirements regarding construction and control of industrial alcohol bonded warehouses are in substance in conformity with those affecting distillery ware-

All doors to the fortifying room must be locked from the inside except the entrance door, which will be locked with Government seal lock, the key of which will at all times when brandy or wines are deposited therein, be in the custody of the officer in charge. Collectors will make requisitions for the necessary locks and seals, the same to be supplied, used and accounted for as in case of distillery warehouse. The owner can only enter the fortifying room by permission of the revenue officer in charge.

Every wine maker must give bond sufficient in amount to cover the tax on the brandy he intends to store in his fortifying room and for any assessments of deficiency found and conditioned that all such taxes or deficiency assessed may be collected under the bond.

houses and fortifying rooms. As provided by Regulations 61, approved July, 1920, page 32, article 36 and page 38, article 46.

General bonded warehouses are provided for by section 51, act of August 27, 1894 (28 Stat. 509) as follows:

“Every such warehouse shall be under the control of the collector of internal revenue of the district in which such warehouse is located, and shall be in joint custody of the storekeeper and proprietor thereof, and kept securely locked, and shall at no time be unlocked or opened or remain open except in the presence of such storekeeper or other person who may be designated to act for him, as provided in the case of distillery warehouse.”

Special bonded warehouses are provided for by section one (1) Act of March 3, 1877 (19 Stat. 393) although passed at an earlier date, the same identical language is used relative to their control as regards general bonded warehouses, *supra*.

In addition to the requirements and control of a fortifying room conforming to those surrounding a distillery warehouse, the same restrictions are thrown around the fortifying room as are provided for industrial alcohol bonded warehouse general and special bonded warehouse.

It therefore appears conclusive that the same requirements and control are now provided for a fortifying room as are provided for all other bonded warehouses mentioned in the statutes. If its uses and purposes are the same, it must follow that it is a bonded warehouse, and that the loss of spirits therefrom by theft is not subject to tax.

There can be only one use and purpose for a bonded fortifying room on the premises of a bonded winery, and

that is to secure the payment of the tax due on the brandy and wine stored therein, else it would be wholly unnecessary to require the bond.

It is submitted that the law, regulations and facts sustain the defendant in error in his contentions, *supra*.

II.

Is a Fortifying Room Situated on Premises of a Bonded Winery "A Distillery or Other Bonded Warehouse" Within the Meaning of Willis-Campbell Act *Supra*?

It has been held in *United States v. Isham* (17 Wall 496) that

"The words of statute are to be taken in the sense in which they will be understood by the public in which they are to take effect. Science and skill are not required in their interpretation, except when scientific and technical terms are used. The liability of an instrument to stamp duty, as well as the amount of such duty is determined by the form and face of the instrument, and can not be affected by proof of facts outside of the instrument itself."

Applying this decision to the meaning of the statutes and regulations involved, it must follow that a fortifying room is one of the other bonded warehouses, designated in the Willis-Campbell Act *supra*. Its uses and purposes are the same as all other uses and purposes of other bonded warehouses, there can be only one use in fact of a bonded warehouse, and that is to secure the payment of the revenues on the objects and goods stored therein. If revenues were paid previous to time the tax paid articles were deposited therein, it would be of no conse-

quence to the Government what was carried on in the warehouse, manufacturing or what not.

The learned trial judge has so clearly and cogently presented this phase of the matter that we shall quote his written opinion [pp. 23 and 24 of transcript]:

“There is one paramount purpose and use common to all such places, namely, that each of such places or depositaries are used for the storage of goods until the taxes are paid thereon. The mere fact that the brandy is mixed and intermingled with the wine in the fortifying room does not alter or destroy the storage or warehouse feature of such a room. It is true it is a place of manufacture, but it is nevertheless a warehouse, because the wine and the brandy are stored therein before being mixed and intermingled the treasury regulations expressly provide that the fortifying room is to be used as a warehouse, or store-room for all brandy necessarily left over after rectification has taken place.

There is no substantial difference in so far as storage use is concerned, between distillery warehouses and fortifying rooms in bonded wineries. Section 24 of Regulations 28, part 1, Revision 1918, page 43 of the Treasury Department furnishes additional strong reasons to believe that the Internal Revenue Branch of the Government considers the fortifying room as a bonded warehouse for the storage of brandy to be used in fortifying wine when it provides for abatement of taxes when such brandy is lost through casualty while in custody of the officers of the Internal Revenue, which is always the case when the brandy is on lawful deposit in the fortifying room.”

The plaintiff in error in his brief takes the position that a fortifying room is not included as a distillery warehouse or other bonded warehouse (p. 8 of brief).

(1) It is not a warehouse as that term is used in revenue laws or regulations or in common parlance.

(2) It is used principally as an incident to the manufacture of wine and not for the storage of distilled spirits. * * *

On the first proposition the courts have established that any place where goods are stored or received for deposit is a warehouse or storage house and that common usage has established the terms as synonymous.

In *Ray v. Com.*, 12 Bush Ky. 397, the court held that granary for keeping and preserving farm utensils is a warehouse.

In *Hunter v. Com.*, 48 S. W. Rep. 1077, it was held that an opera house used for storage and safe keeping of stage properties between occasions when it is used for entertainments, is a warehouse.

Adjudication of the matter of a warehouse establishes that such a room as a fortifying room would, as used in common parlance, be classed as a warehouse and nothing less.

The internal revenue laws have firmly fixed the status of a fortifying room as a storage place.

Section 45, Revised Statutes (26 Stat. 621) provides:

“No wines or spirits other than those permitted by this regulation shall be stored in any room or part of the building in which fortification of wines is practiced.”

Regulations 28, part 1, *supra*, provides:

“The fortifying room must be sufficiently large to admit of the storage of all brandy withdrawn for fortification purposes that may be on hand unused at any one time.”

The second proposition *supra* is likewise not sustained by the law and regulations relative to bonded warehouses.

Congress has, by statute, provided that manufacturing may be carried on upon the premises of a bonded warehouse and to a much greater extent than in a fortifying room and it still remains a bonded warehouse. As clearly appears by the provisions of the Denatured Alcohol Act of June 7, 1906 (34 Stat. 1250) Title III National Prohibition Act (41 Stat. 305), Bottle in Bond Act of March 3, 1897 (29 Stat. 626). Amendment to Section 3221, Revised Statutes (20 Stat. 327). All of said acts provide for allowances of losses of spirits stored in these bonded warehouses under Section 3221 Revised Statutes and each are consequently classed as one of the other bonded warehouses within the meaning of the section and that manufacturing is carried on therein makes them no less a bonded warehouse.

The position of the trial judge is, therefore, more firmly fortified and the contentions of the plaintiff in error cannot prevail.

The plaintiff in error concludes on page 7 of his brief that special and general bonded warehouses are the ones contemplated by section 5, Act of November 23, 1921, by the phrase "distillery or other bonded warehouse," giving as his reasons therefore the precautions in establishment and supervision.

We have shown that the precaution in establishment and supervision is no greater over these warehouses than over a fortifying room, but again reference to the statutes discloses that Congress did not have in mind special and general bonded warehouses as the only other bonded warehouse.

In the year 1872, Section 3221, Revised Statutes, was passed as a part of the Act of June 6, 1872 (17 Stat. 238) which provided among other things as follows:

“The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty and without any fraud, collusion or negligence of the owner, thereof of any distilled spirits while the same remain in the custody of any officer of internal revenue in any distillery or bonded warehouse of the United States and before the tax thereon has been paid may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bonds or enter satisfaction thereon, in whole or in part as the case may be.”

The remainder of the section is the amendment of 1879. It will be noted that the exact language, distillery or bonded warehouse, is used in this early act as appears in the Willis-Campbell Act *supra*. It will be further noted that this section does not provide for loss of spirits by theft.

In the year 1877, the Act of March 3, 1877 (19 Stat. 393) which provided for establishing special bonded warehouses, the provisions of section 3221 were extended to special bonded warehouse as follows:

“And the provisions of existing law relative to an allowance of loss by casualty in a distillery bonded warehouse are hereby made applicable to brandy stored in special bonded warehouses in accordance with provisions of this act.”

In the year 1894 the act providing for general bonded warehouses was passed and again the provisions of section 3221 *supra* were extended to such warehouses as follows:

“* * * Including the provisions for allowance for loss by accidental fire or other unavoidable accident are hereby extended and made applicable to spirits deposited in general bonded warehouses under this act.”

In the year 1906 the Act of June 7, 1906 (34 Stat. 215) page 344, the provisions of section 3221 *supra*, was “extended and made applicable to the loss of grape brandy withdrawn for use in the fortification of sweet wines and which prior to such use is accidentally destroyed by fire or other casualty while stored in the fortifying room on the winery premises.”

Therefore, if Congress had in mind that special and general bonded warehouse were the only one to be included in the phrase “other bonded warehouse” it would have been wholly unnecessary to extend the provisions of section 3221 to apply to them for the phrases in both acts are identical, but if plaintiff in error should be correct in his reasoning, it has been shown that Congress classed a fortifying room on a par with general and special bonded warehouse by extending in 1906 the provisions of section 3221 to fortifying rooms.

It is not conceded that plaintiff in error is correct in his conclusions, the explanation in our opinion of the provisions in the early act 1872, is that at that time the only bonded warehouses in existence were the distillery warehouse and the distillery bonded warehouse, that is, when the spirits were drawn into the barrels from the tanks, commonly known as the cistern room, which was the room designated as the distillery warehouse, and after the barrels were taken from the cistern room to another part of the distillery for storage and ageing and to be kept until

withdrawn and tax paid; this room was known as and called the bonded warehouse, at that early date other warehouses were not provided for or needed.

It is not clear why the provisions of section 3221 were extended to general special bonded warehouses and to bonded fortifying rooms only in view of the position stated that in 1872 there were no such warehouses and consequently in an excess of precaution, the provisions were so extended, however, at this date various characters of bonded warehouses have been established and all such warehouses that are bonded to the United States are known as bonded warehouses.

In Conclusion.

In final confirmance of the decision of the trial court, it is submitted that the room in question is no less a bonded warehouse by being designated a fortifying room.

The true test the trial court said [p. 24 of transcript]

“as to whether a warehouse is bonded appears to be as to whether the Government has taken control of the store house or warehouse and exercise dominion over the premises.”

Citing *United States v. Powell*, 14 Wallace 493.

The question was raised in this case that a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution and is almost identical with the plaintiff's in error contention, the court said:

“Attempt is made to show a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution, but the proposition cannot be maintained as the Act of Congress provides that such a warehouse when approved by the commissioner on report of the collector shall be deemed a bonded

warehouse of the United States and it matters not that the act provides that it shall be known as a distillery warehouse as the requirements of the act are that it shall be under the direction and in the charge of an internal revenue storekeeper assigned thereto by the commissioner, beyond all doubt therefore the internal bonded warehouse referred to in the joint resolution includes the bonded distillery warehouse known as the distillery warehouse described in section 15 of the act imposing taxes on distilled spirits.”

It would appear that this decision makes certain the opinion of the trial court and sustains defendant in error in his contention that a fortifying room of a bonded winery is a bonded warehouse, as it is under all the control by the Government that is placed over a distillery or other bonded warehouse, and the fact that it is known as a fortifying room would not exclude it from being a bonded warehouse and that it thereby falls within the classification of “other bonded warehouses” referred to in the Willis-Campbell Act, *supra*.

Respectfully submitted,

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